NO. 1496

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana.

Appellees.

APPELLANT'S BRIEF.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

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ABSTRACT OF THE CASE.

This is an appeal from a final order and decree sustaining the demurrer of defendants and appellees to appellant's bill of complaint and dismissing said bill. The bill of complaint is found in the record, pages 3 to 26, and, without setting forth the said bill in full, we will, simply for the purpose of showing the nature of the action, give a summary of the facts alleged therein:

On the 14th day of December, 1901, Charles D. McLure, a resident of the City of St. Louis, State of Missouri, instituted an action in the United States Circuit Court in Helena, Lewis and Clark County, Montana, against the Diamond R Mining Company, and had a writ of attachment issued, under which the United States marshal, on the 16th day of December, 1901, filed notice of attachment upon all of the real estate of the Diamond R Mining Company in Cascade County, Montana, and on the 18th day of December, 1901, levied upon all of the personal

property of said company in said county. Summons was served upon L. S. McLure, president of said company, and brother of Charles D. McLure, and on the 16th day of January, 1902, judgment by default was entered for the sum of $86,180.00 and $53.50 costs. No writ of execution was called for or anything further done until the 10th day of January, 1907, when a writ of execution was issued, this being two days after the complainant had filed a petition in intervention in said action. On December 17th, 1901, the Great Falls National Bank, appellant herein, commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the Diamond R Mining Company, and under a writ of attachment issued in said cause the sheriff of Cascade County, on the 17th day of December, 1901, levied upon all the real estate of the Diamond R Mining Company, and also on the following day levied upon all the personal property of said company, by taking possession thereof simultaneously with the said United States marshal, but thereafter surrendering such possession by reason of the interference and obstruction of said marshal. A judgment was subsequently entered in favor of said bank against said company for $25,304.84 and $37.70 costs, and docketed in the office of the clerk of said court, said judgment being still unpaid. Said judgment was based upon moneys advanced by the bank from April 15th to June 15th, 1900.

L. S. McLure, a brother of Charles D. McLure, was at all times the general manager and director of the Diamond R Mining Company, and in personal charge of its affairs, and after the 12th day of June, 1900, was also

the president of the company, and was also, during all the time, the agent and representative of Charles D. McLure. Charles D. McLure was a director until the 9th day of October, 1900, and the two McLures were at all times the largest stockholders of the company, owning and controlling a majority of the capital stock thereof.

The moneys advanced by the bank were for the purpose of meeting urgent current expenses in the building of a concentrator, and the bank refused to loan the money to the company except upon the understanding that Charles D. McLure would immediately repay the same in preference to any other indebtedness of the company, and Charles D. McLure, subsequent to the advancement of said money, promised to pay the same. The bank was thereby led to believe that it would not be obliged to bring suit, knowing at all times that Charles D. McLure was the only other large creditor of the company.

The concentrator was first constructed by the company for a capacity of one hundred tons daily, and had been operated successfully and profitably in concentrating the company's ores, for which purpose it was constructed. Thereafter, Charles D. McLure and L. S. McLure, controlling the affairs of the company, proceeded to enlarge the concentrator to a three hundred ton capacity, and at an additional expense of about $100,000.00, most of which was advanced by Charles D. McLure, and embraces the moneys upon which he recovered judgment. The company agreed to the enlargement of the concentrator and to borrow the money under Charles D. McLure's promise and agreement to consolidate the Broadwater Group of Mines then owned by him with the mines of the company, but which promise and agreement he never kept, there

being thereby a failure of consideration for the notes sued on by him. The concentrator as enlarged was used by Charles D. McLure for his sole benefit in concentrating the ores from his Broadwater Group of Mines, at a loss to the company, instead of being used to treat the ores of the company as originally intended.

Notwithstanding that the concentrator was worth $175,000.00, if kept in operation under the original plan, and notwithstanding that the mining claims and property of the company were altogether worth $500,000.00, and could have been worked and operated at a profit, all of which was well known to Charles D. and L. S. McLure, nevertheless, acting in collusion for the purpose of cheating and defrauding the bank and other creditors, they closed down the concentrator and refused to open the company's mines; then instituted said action and attached all of the company's property.

On the 9th day of February, 1903, one Bartlett foreclosed a lien and recovered judgment against the company for $1,529.90, under which a part of said concentrator was sold on the 20th of February, 1904. No steps whatever were taken by the McLures to redeem the property for the company or to protect its stockholders or creditors, but on the 23rd day of March, 1905, Charles D. McLure redeemed the property sold by paying $1,930.25, and on the 2nd day of January, 1906, he received a sheriff's deed for same.

It is alleged that in all the matters recited Charles D. McLure and L. S. McLure were acting in collusion and for the purpose of hindering, delaying, cheating and defrauding the bank and other creditors.

It is alleged that the value of the property as aforesaid

depended upon keeping it together and operating it as one plant, but that on account of the facts set forth there has been a great depreciation in its value; that since the attachment by Charles D. McLure he has kept one John L. Tripp in possession of the property under his attachment, and has deprived the company and its stockholders of the possession, use and enjoyment thereof, and its mines have suffered great and irreparable damage by disuse and neglect; that there has been a natural depreciation in value of the concentrating plant, so that all of said attached property is not of sufficient value to more than satisfy said Charles D. McLure's judgment.

The bank, being unable to proceed in the state court, did, on the 8th day of January, 1907, file a petition in intervention in said action, and thereafter an amended petition in intervention, which was, on the 2nd day of February, 1907, on motion of said Charles D. McLure, dismissed. On the 12th day of January, 1907, the bank caused a writ of execution to be issued on its judgment, and the sheriff levied upon all the personal property of the company by serving notice, as provided by Section 895 of the Code of Civil Procedure, but the sheriff was unable to proceed further on account of the pretended lien of said Charles D. McLure.

The bank instituted this action in equity on the 25th day of February, 1907, so as to prevent a conflict between the jurisdiction of the state and federal courts, and prayed permission of the court to proceed under its execution upon its judgment, and prayed further that the court adjudge and decree that it has a first and prior lien upon all of said property by virtue of its attachment, and that the pretended lien of Charles D. McLure be declared

null and void, or in any event lost and abandoned; that his writ of execution be withheld, and that defendants be enjoined from selling any of said company's property, and for general relief.

To said bill of complaint the defendants filed a demurrer (Tr. pp. 26-7) upon the following grounds: First. That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit. Second. That said plaintiff has not shown by its said bill that it has any right or interest in the said properties therein described which would entitle it to the relief thereby prayed. Third. That the facts and circumstances stated in said bill do not amount to a fraud. Fourth. That the bill does not set out distinctly the particulars of the fraud alleged, nor the manner in which the court or the plaintiff herein was misled or imposed upon. Fifth. That it appears upon the face of said bill that plaintiff has been guilty of laches, and is not entitled to the relief prayed, or to any relief in the premises. Sixth. That said plaintiff has not, in or by the said bill, made or stated such a cause as doth or ought to entitle it to any such discovery or relief as is thereby sought or prayed for.

The court thereafter, to-wit: on the 5th day of August, 1907, sustained said demurrer, and on the 6th day of August, 1907, entered a decree finally dismissing said bill of complaint.

ASSIGNMENT OF ERRORS.

Now comes the Great Falls National Bank, complainant, in the above-entitled cause, by its solicitor, and says that in the order of August 5th, 1907, and decree in said cause, entered on the 6th day of August,

1907, and in the record and proceedings therein, there is manifest error, and he files the following assignment of errors, committed or happening in said cause, and upon which it will rely on its appeal from said order and decree:

1. The court erred in its order of August 5th, 1907, in sustaining defendants' demurrer to complainant's bill of complaint in this, that the said demurrer should have been overruled.

2. The court erred in its said decree of August 6, 1907, in finally dismissing said bill of complaint, in that (a) the said bill of complaint set forth facts showing that the attachment of the defendant, C. D. McLure, was sought and made for the purpose of hindering, delaying and defrauding the creditors of the Diamond R Mining Company, and particularly the complainant herein, and was therefore void. (b) The said bill of complaint further set forth facts showing that whatever lien the said C. D. McLure may have acquired by virtue of said attachment, was waived, abandoned and lost by reason of his unreasonable delay and laches in having issued out of said court a writ of execution for the sale of the property upon which he claimed an attachment lien, and the rights of the said C. D. McLure thereby became subject and subordinate to the attachment lien of the complainant herein, and (c), the said bill of complaint set forth facts showing that the complainant was entitled to the equitable relief prayed for.

BRIEF OF THE ARGUMENT.

We will discuss the questions involved under five separate headings, to-wit:

First. The Circuit Court of the United States has jurisdiction of this case, and the remedy sought is the proper one.

Second. The defendant and appellee, Charles D. McLure, under the facts alleged in the bill, could not obtain a valid attachment lien in preference to the appellant bank.

Third. The attachment lien sought to be obtained by said Charles D. McLure was for the purpose of hindering, delaying and defrauding the appellant bank, and is therefore void, and the redemption of March 23, 1905, was likewise fraudulent and void.

Fourth. The attachment lien, even though valid in the first instance, was lost by delay in issuing a writ of execution for the sale of the property.

Fifth. This action is not barred by appellant's laches.

I.

The Circuit Court of the United States has jurisdiction of this case, and the remedy sought is the proper one.

In a case of a conflict of jurisdiction, the possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application

to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suit was brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to state and federal courts.

2 Bates on Fed. Eq. Pro., Sec. 613.

Morgan v. Sturgis, 154 U. S. 256; 38 L. Ed. 287.

Central Nat. Bank v. Stephens, 169 U. S. 432; 42 L. Ed. 807.

Farmers' Loan & Trust Co. v. Lake St. R. Co., 177 U. S. 51; 44 L. Ed. 667.

Krippendorf v. Hyde, 110 U. S. 276; 28 L. Ed. 145.

Covell v. Heyman, 111 U. S. 176; 28 L. Ed. 390.

Gumbel v. Pitkin, 124 U. S. 131; 31 L. Ed. 374.

Arrowsmith v. Gleason, 129 U. S. 86; 32 L. Ed. 630.

4 Cyc., 651-2.

II.

The defendant and appellee, Charles D. McLure, under the facts alleged in the bill, could not obtain a valid attachment lien in preference to the appellant bank.

In support of this proposition we are not now relying upon the many fraudulent acts and circumstances set forth in the complaint, for those will be discussed later. We are, for present purposes, simply relying upon the facts alleged to the following extent: That Charles D. McLure was one of the largest stockholders of the

Diamond R Mining Company, and was, until the 10th day of October, 1900, a director in said corporation; that he and his brother, L. S. McLure, together owned and controlled a majority of the capital stock of said corporation, and managed and controlled its affairs; that his brother, L. S. McLure, was its general manager and in the personal charge of its affairs, and after the 12th day of June, 1900, was also president; that said L. S. McLure was also, during all the times stated in the complaint, the agent and representative of Charles D. McLure, who was residing in the City of St. Louis, State of Missouri; that the attachment suit of Charles D. McLure was based upon moneys previously advanced, and was instituted after Charles D. and L. S. McLure had closed the company's properties and the company had ceased to do business; that said brothers acted together and in collusion in instituting said suit; that summons was served upon L. S. McLure, and judgment by default entered based upon said service.

The Court's attention is directed to a very interesting discussion by Judge Thompson as to the power of corporations to prefer creditors, found in Vol. 5 of Thompson on Corporations, Secs. 6492 to 6520, and in 10 Cyc. pp. 1246 to 1269. Judge Thompson, in Sec. 6492, supra, begins this discussion as follows:

"There are two doctrines upon this subject; one,—and the only one which is deserving of any respect,—is that the assets of the corporation are a trust fund for its creditors; that when the corporation becomes insolvent, or when its affairs reach such a state that its stockholders or directors find themselves obliged to deal with its assets in view of its approaching suspension, they can only

deal with them in the character of trustees for its creditors; that this necessarily means that they can only deal with them as trustees for all its creditors, and not for particular creditors whom they may desire to pay in preference to the others,— that is, to pay out of money which equitably belongs to the others. This doctrine, in short, is that a corporation being insolvent, or dealing with its funds in contemplation of insolvency, and not in the ordinary course of its business, has no power to prefer particular creditors."

Numerous authorities are cited in support of the author's position, and also some decisions holding to the contrary, the fallacy of which Judge Thompson clearly demonstrates.

He then proceeds to discuss the right of corporations to prefer their own directors who are creditors, which has been recognized by some courts, and then says: (Sec. 6503) "The better doctrine, and one resting on principles of justice too obvious for explanation or comment, is that when a corporation is insolvent, or when it reaches such a condition that its creditors see that they must deal with its assets in the view of its probable suspension, they cannot use those assets to prefer themselves as creditors or sureties in respect of past advances, to the prejudice of its general creditors."

(Sec. 6504) "We therefore find that the view that directors, or other officers of a corporation, can, in the presence or in the prospect of corporate insolvency, prefer themselves as creditors in respect of debts previously contracted over other general creditors, is almost universally repudiated by the courts. * * * This obligation to hold the assets of the corporation as a trust fund for

equal distribution among its creditors attaches to the directors, not only when they have voted the corporation to be insolvent, but whenever the fact that it must discontinue business by reason of insolvency comes to their knowledge. The only sound principle is that the directors of the corporation cannot prefer themselves as creditors, either when it is in fact insolvent, or when its condition is such that the act is done by them in contemplation of its insolvency."

The author follows this discussion by the announcement of the following principle: (Sec. 6506) "The power of directors of insolvent corporations to prefer their own relatives stands in reason on much the same footing as their power to prefer themselves. It has been held that such directors cannot prefer their relatives who are corporation creditors. But where the rule of the particular jurisdiction allows the directors to prefer themselves, they can, for just as good reason, prefer their relatives."

In Sec. 6508, he says: "Where an insolvent corporation has no means to contest attachment suits, and where the result of efforts to dissolve attachments would be doubtful, it is not a breach of trust for the directors, on advice of counsel and in good faith, to make an advantageous sale of the corporate assets to an attaching creditor, on condition that he cancel his own debt and discharge the debts of the other attaching creditors."

Numerous decisions are cited in support of the above text, the more important of which, together with others upholding the same doctrine, are as follows:

Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496; 11 C. C. A. 320.

Howe, Brown & Co. vs. Sanford Fork & Tool Co., 44 Fed. 231.

Lippincott v. Shaw Car. Co., 25 Fed. 585.

Erwin v. Or. Ry. & Nav. Co., 27 Fed. 625.

White Mfg. Co. v. Pettus Imp. Co., 30 Fed. 864.

Adams v. Kehlor Milling Co., 35 Fed. 433.

Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7.

Sidell v. Missouri Pac. Ry. Co., 78 Fed. 724, 24 C. C. A. 216.

Chick v. Fuller, 114 Fed. 22; 51 C. C. A. 648.

Hart v. Globe Ins. Co., 113 Fed. 342.

N. W. Mutual Ins. Co. v. Cotton Exchange Real Estate Co., 70 Fed. 155.

Washburn v. Green, 133 U. S. 30; 33 L. Ed. 516.

McGourkey v. Toledo & Ohio C. R. Co., 146 U. S. 536; 36 L. Ed. 1085.

Drury v. Mil. & S. R. Co., 74 U. S. 299; 19 L. Ed. 40.

Sawyer v. Hoag, 17 Wallace 610; 21 L. Ed. 731.

Michaud v. Girod, 45 U. S. 503; 11 L. Ed. 1102.

Koehler v. Hubby, 67 U. S. 715; 17 L. Ed. 339.

Jackson v. Ludeling, 88 U. S. 616; 22 L. Ed. 493.

Upton v. Tribilcock, 91 U. S. 45; 23 L. Ed. 203.

Sanger v. Upton, 91 U. S. 56; 23 L. Ed. 220.

Hindman v. O'Connor, 13 L. R. A. 494.

Rouse v. Merchants' Nat. Bank (O.), 5 L. R. A. 378.

Arkansas Valley Agr. Society v. Erchholtz (Kas.), 25 Pac. 613.

Olney v. Conanicut Land Co. (R. I.), 5 L. R. A. 361.

Conover v. Hull (Wash.), 39 Pac. 166.

Compton v. Schwabacher (Wash.), 46 Pac. 340.

Adams v. Deyette (S. Dak.), 31 L. R. A. 497.

Portland Con. Mining Co. v. Rossiter (S. Dak), 94 N. W. 702; 102 A. S. R. 726.

Slack v. Northwestern Nat. Bank, 103 Wis. 57; 74 A. S. R. 841.

Nixon v. Goodwin (Cal.), 85 Pac. 169.

3 Clark & Marshall on Corporations, pp. 1937, 2423-4.

In Lippincott v. Shaw Car. Co., 25 Fed. 585, the Court, after holding that the indebtedness for which the mortgage in question was given was contracted in good faith, nevertheless decides that the mortgage was invalid because two of the directors were endorsers upon the note secured thereby, and says: "In manifest accord with the tendency of judicial opinion, as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. This, as it seems to me, is the salutary rule, and the only rule which can be administered with uniformity and fairness."

In Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7, an action brought by creditors to set aside a trust deed, the Court said: "The deed of trust was in effect a confession of insolvency; it conveyed all the company had to meet only a part of its liabilities. It took away the ability of the directory to further prosecute the object of the franchise. While the corporate autonomy was not extinguished in law, it exists merely in a state of suspended animation, with no reasonable hope or assurance of resuscitation. When a corporation in its business affairs is thus in articulo mortis, whatever may yet be maintained on divided opinions as to its right to dispose of its property so as to give a preference

to some general creditor, the law is too well settled, at least in this jurisdiction, to admit of extended discussion, that its directors cannot make a disposition of the assets to secure to themselves, directly or indirectly, a preference over general creditors."

In Howe v. Tool Co., 44 Fed. 231, Judge Woods thus expressed himself: "A sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, as it may be, exclusive knowledge of the corporate affairs into means of self protection, to the harm of other creditors; they ought not to be competitors in a contest of which they must be the judges. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be, in ordinary cases, no means of discovering the truth, and consequently the presumption to the contrary should in every case be conclusive. Besides inconsistent with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence."

In Mfg. Co. v. Hutchinson, 11 C. C. A. 320, Justice Harlan discusses this subject at some length, and among other things says: "The law in effect says to all who deal with private corporations that they must look to this property as the only security for the fulfillment of its obligations, and if the law gives this assurance to creditors of a corporation, those who are authorized to represent it in its dealings with the public, who control and manage its property, and upon whose fidelity and integrity

the public, as well as creditors, rely, ought not to be permitted, when the corporation becomes insolvent and abandons the objects for which it was created, to appropriate to themselves as creditors any more of the common fund in their hands than is ratably their share. Those, therefore, who hold fiduciary relations to creditors ought not to be allowed by any form of proceeding, or by their own act, after the corporation is practically extinct, to appropriate its property for their special benefit, to the injury of those who, upon every principle of justice, have equal rights with themselves."

The case of Adams v. Kehlor Milling Co., 35 Fed. 433, is very much like the case at bar so far as the principles involved are concerned, and in his opinion Judge Thayer said: "It may be conceded that a corporation, though insolvent, has the power to prefer creditors, but the relation which directors bear to the corporation as trustees of its assets is such that they cannot lawfully exercise the power in question for their personal advantage. It is but an application of the same principle to say that if the directors of an insolvent corporation in the distribution of its assets pay a certain creditor in full to the exclusion of others, the choice ought not to be influenced solely by relationship existing between the directors and the creditors so preferred, or by other considerations of a purely selfish nature. In the present case it was the estate of a deceased director and president of the corporation that was preferred. The majority of the board were brothers of the deceased. One of them was agent for the estate and controlled and voted its stock at corporate meetings. The interest of the estate was as effectually represented in the board at the time the preference was

given by and through J. B. M. Kehlor, its agent, as it could have been by the deceased director himself." It was therefore held that a preference given to the estate of J. C. M. Kehlor, who in his life time had been a director of the corporation and its largest and most influential stockholder, was unlawful."

The case of Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co., 70 Fed. 155, was very much like the case at bar, in that the beneficiary of the preference, A. G. Black, was not a director, but was a large stockholder, residing out of the state, and commenting on this the Court said: "It would be a travesty of justice if this non-resident stockholder could be permitted to organize a business corporation under the laws of this state through a mere resident figurehead, and while taking to himself the protection of the laws of the state and the benefits of the corporation as a real manager, he could escape the just responsibilities attaching to the office of a director. The law looks to substance rather than form. A court of equity has no respect for mere shams."

In Nixon v. Goodwin (Cal.), 85 Pac., on page 172, the Court says: "The rule is that a director of an insolvent corporation cannot receive to himself any preference or advantage over other creditors in the payment of his debt. And surely the same rule would apply with equal force to one who is a large creditor of a corporation of which he is a director and the president, and who resigns today that he may tomorrow accept a conveyance to himself of the corporation's property. * * * Under the circumstances in this case, that all the debts owing by the corporation were contracted while defendant was

a director, and presumably contracted at his instance and request, as he was president, it seems to us the deed made to him on April 3rd, the day after he had resigned, was just as fraudulent and void as if it had been made April 1st and while he was yet a director. Could he thus divest himself of his trust relations so that he might make legal the act which the law declares illegal while a director? I think not, for the same undue advantage which the law prohibits is still exercised. A director of a corporation may advance money to it, may become its creditor, may take from it a mortgage, or any other security, and may enforce the same like any other creditor, but always subject to severe scrutiny and under the obligation of acting in the utmost good faith. The officers of a corporation hold its property in trust for its stockholders, and incidentally for the creditors, and any transaction on the part of the directors which is tainted with fraud, or any violation of the duties of their trust, is voidable."

The case of Slack v. Northestern Nat. Bank, 103 Wis. 57, also contains language quite pertinent to the case at bar: "To say that legally elected officers cannot prefer themselves, but that persons who are in fact acting as officers and managing the business can prefer themselves, would seem an anomaly in the law. Such a holding sacrifices substance to form, and would open an easy way by which the assets of the insolvent corporation could be divided up among persons who were officers de facto but not de jure. The law is guilty of no such absurdity. In this case, the defendant, through its officers, was, in fact, managing the affairs of the savings bank; it could no more prefer itself out of the assets of the savings bank

when it was insolvent, and was on the verge of suspension, than could legally elected directors, and for the same reasons. This seems to us good sense and good law, and it does not infringe upon the doctrine that a mere creditor of an insolvent corporation may, by voluntary transfer in good faith, receive and hold property of the corporation in payment of his debt, or as collateral thereto."

In Sidell v. Missouri Pac. Ry. Co., 78 Fed. p. 727, the Court says: "When a majority of the stockholders of a corporation combine to effect some predetermined scheme of corporate action, and by their vote select a body of directors to carry it out, they practically constitute themselves the corporation for that particular object, and assume the fiduciary relation which the directors themselves occupy. Ervin v. Navigation Co., 27 Fed. 625; Farmers' Loan and Trust Co. v. New York and N. Ry. Co., 150 N. Y. 410, 44 N. E. 1043. The same result follows when one individual, or a corporation, exercises this control by its majority voice and vote. If the corporation is insolvent, this trust relation towards creditors forbids the majority stockholder from appropriating for his own advantage the property or fund in which all have a community of interest. Jackson v. Ludeling, 21 Wall. 616."

In Washburn v. Green, 133 U. S. 30, the Court says: "Richardson's relation to the subject matter of this controversy was threefold: (1) That of a creditor of an insolvent corporation, claiming for his debt priority of payment over those of all other creditors, out of a fund from a foreclosure sale of the mortgaged property; (2) That of a director and officer of that corporation at the

time his debt against it was created, and (3) That of the largest stockholder of its capital stock. Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security. But courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care, and unless satisfied by the proof that the transaction was entered into in good faith with a view to the benefit of the company as well as of its creditors, and not solely with a view of his own benefit, they refuse to lend their aid to its enforcement." The Court goes on to quote approvingly from Sawyer v. Hoag, 17 Wallace 617, as follows: "It is therefore but just that when the interest of the public, or of strangers dealing with this corporation, is to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally or inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

Without quoting further from the foregoing decisions, the application of the principles therein announced to the case at bar is thus stated in 6 Thompson on Corporations, Sec. 7796: "The doctrine that the assets of a corporation are a trust fund for all its creditors, and that its directors, as the custodians and trustees of this fund, are bound, in the event of insolvency, or of anticipated

insolvency, to deal with it for the equal benefit of all the creditors, and are prohibited from so dealing with it as to secure preferences to themselves as creditors over other creditors, operates, of course, to prevent them from obtaining such preferences by the abuse of legal process. They cannot, for instance, obtain such preference by causing the corporation to confess judgment in their favor. Obviously, they will not, for the same reason, be allowed to get such a preference by attachment. The inequity of allowing such a preference is obvious, since they themselves create the conditions which give ground to attachment, and will ordinarily have knowledge of the existence of those conditions prior to any other creditor."

In Portland Con. Mining Co. v. Rossiter, 16 S. D. 633, 94 N. W. 702, the Court says: "The conclusion reached in Adams Co. v. Deyette, 5 S. D. 424, that the directors of an insolvent corporation, as trustees for all creditors, are bound to preserve and equally administer all of the property in the interests of all of the creditors, and are incapable of preferring one another, is broad enough to include a judgment by default secured principally for their exclusive benefit and by service of the summons upon themselves. It would be inequitable to judicially sanction this judgment and execution sale of all the corporate property, aggregating $45,000.00, in satisfaction of an antecedent debt of less than one-half that amount, two-thirds of which is owned by directors of the insolvent corporation charged with the legal obligation of protecting the paramount rights of creditors."

To successfully maintain the proposition stated at the beginning of this subdivision of our brief, it is unneces-

sary to go as far as Judge Thompson and other eminent authorities have gone in their treatment of the so-called "trust fund" doctrine. We do not need to take the position that a corporation in contemplation of insolvency cannot give a preference to any of its creditors under any circumstances. We simply contend that Charles D. McLure occupied such a relation to the Diamond R Mining Company and to the appellant bank that the preference sought to be obtained by him was unlawful. While there is conflict of authority as to the general application of the "trust fund" doctrine, the decisions and text-books are practically united in holding that a creditor in McLure's position could not obtain a valid preference. The decisions of the federal courts are substantially as one on this proposition, as we have shown. It is of no moment that McLure was not a legal director of the company when he attached. He was in fact much more than a mere member of the board of directors, for he and his brother together owned and controlled a majority of the capital stock and absolutely controlled and dominated the business and affairs of the company. L. S. McLure, the president and manager of the company, was also the agent and representative of Charles D. McLure. Charles D. McLure did not need to be a member of the board, for he had his agent and representative there in the person of his brother. As some of the courts from which we have quoted stated, "the law looks to substance rather than form, and a court of equity has no respect for mere shams." In contemplation of law, the directors manage and control the business of a corporation, but in this case, as a matter of fact, these powers were usurped and exercised by these two stockholders alone. The principles

upon which the rights of a corporation's creditors are founded are too firmly established in equity jurisprudence to be frittered away by a mere quibble as to the official title of those in charge of a corporation's affairs. The foundation of the principle alluded to is that the directors, or "managing agents" as many of the courts express it, are in a peculiar position of advantage over other creditors, and should therefore be prohibited from obtaining a preference of any character. To allow C. D. McLure to withdraw himself from the operation of this principle, in view of the facts pleaded, would make it easy for any designing stockholder to circumvent the application as to him of this wholesome equitable doctrine.

It was clearly a fraud in law for L. S. McLure, the president and manager of the corporation, to act also as the agent and representative of his brother where a conflict might arise, and as Charles D. McLure necessarily knew that L. S. McLure was occupying this dual position he thereby became a party to the fraud. These principles, so well recognized in equity, are emphasized in Montana by the following provisions of the Civil Code:

Sec. 2970. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Sec. 2971. A trustee may not use or deal with the trust property for his own benefit, or for any other purpose unconnected with the trust, in any manner.

Sec. 2972. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in

which he or any one for whom he acts as agent has an interest, present or contingent, except as follows: 1. When the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. 2. When the beneficiary, not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission; or, 3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed.

Sec. 2973. A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

Sec. 2974. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.

Sec. 2975. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

Sec. 2976. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust.

Moreover, at the time the loan was made by the appellant bank, Charles D. McLure was in fact one of the directors of the company. He also agreed to repay said

moneys to the bank. This promise led the bank to believe that it would not be obliged to bring suit to enforce payment. McLure's failure to keep this promise, followed by his attachment of all the company's property, was clearly a fraud upon the rights of the bank, and it would be most inequitable and also shocking to one's sense of justice to permit him, after all this, to obtain and hold a valid lien, and thereby prevent the bank from recovering the moneys which it had advanced.

As showing the position which the Supreme Court of Montana has taken with reference to the duties and obligations of those occupying fiduciary relations to corporations, we cite the following:

Coombs v. Barker, 31 Mont. 526.

McConnell v. Combination M. & M. Co., 31 Mont. 563.

In the first case, wherein the court set aside a redemption made by some of the directors and stockholders of a corporation from a sheriff's sale, where no opportunity had been given to the stockholders to protect their interests, the Court says: "Counsel cite numerous cases holding that a director may become a purchaser of corporate property at a judicial sale when such sale is made by another creditor and when the director has no control over the proceeding. We also agree with this doctrine, subject to the qualification, however, that the acts of the director must be fair and honest, and he be not permitted to obtain any dishonest advantage over the corporation or stockholders. * * * Counsel for defendants claim that there is no fraud in fact alleged against the defendants in the complaint. Whether this is true we deem immaterial. A breach of official duty on the part of the

defendant directors is clearly alleged and relied upon. This is a fraud in law and sufficient to warrant relief if proven."

The Court in that case, coming to a consideration of the rights of one of the stockholders who participated in the redemption, but who was not a director, says: "Being present at the time the redemption was agreed upon, and taking part therein and joining in the redemption in the manner as shown by the record, conclusively satisfies us that he should be charged with knowledge that the transaction was constructively fraudulent, and therefore he stands in no better position than the directors involved. He being the agent of Mrs. Collins in the redemption, she is charged with all the knowledge he possessed. (Sec. 3112, Civil Code.)"

In another part of the opinion, the Court says: "Neither is there any explanation offered as to why the summons was not served in the usual way upon the defendant corporation, or why notice of the pendency of the suit was not given to any one except the directors who took part in the redemption. There is too much opportunity for fraud under such circumstances to maintain them in absence of any explanation. The directors may have conspired among themselves to allow this judgment to be entered so short a time before the redemption, to take an assignment of the judgment and redeem the property to the utter exclusion of all the other stockholders. The manner of showing the bona fides of the transaction was, if such was the fact, clearly within the power of the directors. They sit by silently and say nothing, and this Court, under the circumstances detailed, cannot say that their acts were bona fide and sufficient

to maintain their position."

In the other Montana case cited, the Court says: "As to the stockholders the directors are trustees, besides being agents of the company and stockholders, and may not be permitted to so deal with the trust property as to secure therefrom a profit to themselves."

A reading in full of the Montana decisions will show that they are in line with the decisions of almost all the federal and state courts in holding that in all contracts and transactions between a corporation and those standing in a fiduciary relation to it, the burden is upon the latter to show that the transaction was fair and honest and not for the purpose of obtaining any advantage over the stockholders or creditors of the corporation.

Even those courts that do not uphold the so-called "trust fund" doctrine nevertheless uphold the principle just announced, and we cite below some of these decisions; which clearly uphold us in our contention that our bill of complaint states a cause of action, even though they may not go so far as other courts have gone:

Regan v. First Nat. Bank (Ind.), 61 N. E. 583.

Citizens' Nat. Bank v. Goshen Woolen Mill Co. (Ind.), 69 N. E. 206.

Roberts & Co. v. Victor, 130 N. Y. 585; 29 N. E. 1025.

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Illinois Steel Co. v. O'Donnell, 156 Ill. 624; 31 L. R. A. 265.

In Citizens' National Bank v. Goshen Woolen Mills Co., supra, is found a very exhaustive discussion, with numerous authorities cited, pro and con, upon the trust fund and kindred doctrines, and while the court

recognizes the right of a corporation, under certain circumstances, to prefer creditors, it nevertheless says: "It would seem to violate the very spirit of equity to permit these managing agents and trustees, when the corporation becomes insolvent, to act as grantors for the corporation in distributing to themselves as grantees the remaining assets of the corporation upon their own unsecured antecedent claims to the exclusion of other unsecured creditors."

In the case of Illinois Steel Co. v. O'Donnell, supra, the Court points out a very reasonable distinction between good and bad preferences, as follows: "A rule that would prevent directors and officers of financially embarrassed corporations, acting in good faith and for the apparent benefit of such corporations, from loaning their money, and at the same time taking from them security for repayment,— the terms and the securities being such as are in accord with the usual course of business,— would be highly injurious to corporations themselves and frequently detrimental to the interests of their creditors. The line of demarcation that separates valid from invalid preferences to directors or officers of insolvent corporations, lies between already incurred liabilities and liabilities assumed by going corporations at the time the securty is given and taken." This is in harmony with the decision in Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

III.

The attachment lien of Charles D. cMLure was made to hinder, delay and defraud the bank, and is therefore void.

We have, in the previous discussion, contended that Charles D. McLure's position with relation to the mining company and the appellant bank was such as to render his attachment lien invalid. The bill of complaint, however, does not stop with the simple allegations of what would constitute fraud in law. It alleges also that "the said attachment by the defendant herein, Charles D. McLure, as plaintiff in said cause, was not sought or made in good faith as stated in his affidavit therefor, but was made and the said action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant and other creditors out of their claims and demands, and the said proceedings will have the effect so intended unless set aside by this court." (Tr. p. 11, lines 22-28; p. 12, lines 1-3.)

Under Sec. 891, Subdivision 2, of the Code of Civil Procedure of the State of Montana, it was necessary for McLure, in order to procure the issuance of a writ of attachment, to make an affidavit stating, among other things, "that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant." This affidavit is the foundation of the attachment, and it goes without saying that, before the plaintiff's attachment in that action can be upheld as to creditors, the facts must be as alleged in the affidavit, and the complainant herein now seeks to show, as it has a right to do, that said attachment was not made in good faith, but for the purpose of hindering, delaying and defrauding the complainant. It is unnecessary to cite authorities showing that the complainant is not bound or concluded by the judgment in that case, to which it

was not a party, and necessarily it is not bound or concluded by the proceeding in attachment to which it was not a party.

In this connection, we wish to call the Court's attention to Sec. 4490 of the Civil Code of Montana, which is as follows:

"Every transfer of property, or charge thereon made, every obligation incurred, every judicial proceeding taken, and every act performed, with intent to delay or defraud any creditor or other person of his demand, is void against all creditors of the debtor and their representatives or successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

While the law would doubtless be the same without this provision of our code, yet any question as to the law is removed by this specific provision, rendering void as to creditors every judicial proceeding taken with intent to delay or defraud any creditor.

Similar allegations are contained in the bill attacking the judgment in the case, thereby bringing into issue the validity of the whole proceeding. It is alleged, too, that the moneys sued for by McLure were advanced to the company for the purpose of enlarging its concentrator, and that they were borrowed under the promise and agreement of McLure that he would consolidate the Broadwater Group of Mines, then owned by him, with the mines of said company, but which promise and agreement he never kept, there being thereby a failure of consideration for the notes sued on by McLure. (Tr. pp. 12-13.)

Numerous allegations are contained in the bill showing

the bad faith, fraud and collusion of the two McLures. Reference is made to the complaint for a detailed statement, as we will confine ourselves here only to this very brief summary, in addition to what we have already mentioned, to-wit:

That the hundred ton concentrator first erected had been operated successfully and profitably in concentrating ores on the dump of the company's mines as intended; that the two McLures enlarged the concentrator to a three hundred ton capacity, for which Charles D. McLure advanced the money afterward sued on; that the concentrator was then used by Charles D. McLure for his sole benefit in concentrating ores from his own mines, at a loss to the company; that the concentrator was reasonably worth $175,000.00, if used as intended, and the mine and concentrator taken together were worth $500,000.00 and the mines could have been worked and operated at a profit, as the two McLures well knew, but, nevertheless, the said McLures, acting in collusion for the purpose of cheating and defrauding the complainant, closed down the concentrator, failed and refused to open the company's mines, and at once instituted the attachment suit; that they have kept one of their employes in charge of all said property, and have deprived the company of the use and enjoyment of the same; that the two McLures, acting collusively and fraudulently, took no steps whatever to redeem a portion of the concentrator from the sale made to Bartlett, or to protect the interests of the stockholders or creditors, but Charles D. McLure redeemed the same for himself by paying the insignificant sum of $1,930.25, and thereafter taking a sheriff's deed; that this act caused a great depreciation in the plant by

the attempted segregation of a portion thereof, and on that account, and by reason of their delay of five years in proceeding any further, the property has depreciated in value so that it would not sell for more than enough to satisfy McLure's judgment. (Tr. pp. 12-18.)

All of these acts are charged to have been done by the McLures with the intent to hinder, delay, cheat and defraud the complainant, and it is alleged that the complainant will not be able to realize on its judgment unless the lien claimed by McLure under his attachment and judgment is set aside.

In view of all these facts as alleged, how can any court say that there is no equity in complainant's bill? The books are full of cases wherein the courts have granted redress to complainants whose grievances fall far short of those here complained of. Here is a case of a clear and deliberate scheme and conspiracy to wreck a corporation. A concentrator has been erected, which has successfully and profitably treated the ores already on the dump of the company's mine, and so successful has it been that it is enlarged so as to treat three hundred tons per day. McLure himself is so impressed with the success of the enterprise that, as the principal stockholder and beneficiary, he advances $75,000.00, or thereabouts, for this enlargement of the plant. While this work is going on, request is made of the Great Falls National Bank to advance $20,000.00 to meet urgent current expenses in connection with the work. The bank grants this request and lends the money to the company, but as a matter of prudence, knowing that Charles D. McLure was the principal stockholder and was advancing the bulk of the money, only made this loan with the

understanding that Charles D. McLure would repay it. McLure was at all times a resident of St. Louis, and what was done was necessarily through his agent, L. S. McLure, but he later promised to pay this money. The bank's money was thus used in the completion of the plant, but when completed the two McLures, having control of the company's affairs, used the concentrator for C. D. McLure's personal benefit instead of for the benefit of the company as was intended. The mines of the company were valuable, which the McLures knew, but they nevertheless refused to carry on the business of the corporation, closed down the concentrator and brought the attachment suit. If this sort of conduct can be tolerated by any court, it is within the power of one or two stockholders, who get control of a corporation, to absolutely defeat its object, and then appropriate to themselves exclusively what has been largely paid for by the other stockholders and creditors.

We confidently submit that this Court will not say, in view of all these allegations, that this bill of complaint does not state a cause of action, or that complainant is not entitled to relief.

We dare say that, in the multitude of cases which have come before the courts involving similar questions, not one decision can be found upholding acts and proceedings such as are complained of in this case. Where a preference by a corporation has been upheld, the facts have shown that it was for the purpose of securing moneys advanced for the benefit of the corporation and to enable it to carry out the object of its existence, and the preference thus allowed to stand has been given at the time the moneys were so advanced. There is no

similarity between such cases and the one at bar.

Counsel for appellees will doubtless argue before this Court, as they have before the Circuit Court, that enough does not appear in the bill of complaint to show that there was any valid defense to the action at law brought by Charles D. McLure against the Diamond R Mining Company, and that for this reason the appeal should be dismissed. While we disagree with counsel, and submit that the bill sets forth facts showing a failure of consideration for the note sued on, and that the judgment against the company could properly be set aside on that ground, yet we wish to say further that counsel entirely misapprehend the purpose of this action if they consider that it is simply based upon the attack made upon the judgment itself. While the setting aside of the judgment would necessarily carry everything else with it, yet the appellant, as an attaching and judgment creditor, is affected and prejudiced, not by the judgment recovered by McLure, but by the lien which he claims to have under his attachment. It is this lien and not the judgment which stands as an obstruction and hindrance to the enforcement of the complainant's judgment.

In practically all of the cases that we have heretofore cited, no question has been raised as to the indebtedness of the creditor whose preference has been attacked. The preference itself, whether by mortgage, deed of trust or attachment, and not the indebtedness, has been the subject of consideration. It matters not to appellant what the court may do with McLure's judgment, no matter how fraudulent it may be in law and in fact, so long as the court shall decide, under the facts pleaded, that the attachment lien claimed by McLure is an illegal prefer-

ence and that the proceedings thereby instituted by him were void under Section 4490 of the Civil Code of Montana.

We wish now to say a few words with reference to the redemption of that portion of the concentrator first constructed and sold by Bartlett under foreclosure proceedings. In paragraph 8 of the bill (Tr. p. 14) it is alleged "that the defendant Charles D. McLure, and his brother, L. S. McLure, acting collusively and fraudulently, took no steps whatsoever to redeem said property for the company, or to protect the interests of the stockholders or creditors thereof, but on the 23rd day of March, 1905, the defendant, Charles D. McLure, redeemed the said land and premises from said sale for himself by paying to the said sheriff the sum of $1,930.25." In paragraph 9 (Tr. p. 16) it is further alleged "that said McLures acted in collusion, and with the same fraudulent purpose and design, in making no reasonable effort to pay the said claim of said George F. Bartlett, and permitting the sale of said land and premises to satisfy his said judgment, and in effecting the redemption of said property in the manner aforesaid, to the great damage, loss and injury of this complainant, etc." The damage and injury to the entire plant by this sale and redemption is also pleaded in the bill. (Tr. p. 17.) The facts with reference to this sale and redemption are set forth as a part of the general conspiracy and scheme to defraud the complainant.

We submit that a court of equity should not permit McLure, under the facts and circumstances disclosed, to hold this portion of the concentrator, which cost $75,000.00, and which is part and parcel of the complete concentrating plant, by his payment of the paltry sum of

$1,930. The inequity of such a thing is too glaring to require comment, even though McLure, in effecting such redemption, was exercising a statutory right, as his counsel contend. The two McLures occupied such a relation to the corporation as made it incumbent upon them to use some diligence in an effort to save its property for the stockholders. The stockholders and creditors had a right to look to them, as the men actually in charge of the company's affairs, to take whatever steps might be necessary. They, however, did nothing; they allowed the property to be sold without calling the stockholders or directors together for the purpose of seeing what might be done. McLure allowed his attachment and judgment to stand from January 16th, 1902, until March 23rd, 1905, so that by virtue thereof he might have the "statutory right" of redemption by paying $1,900.00 for property worth $75,000.00, and still have his judgment for $86,000.00 left. The citation of authorities ought not to be necessary to move a court to condemn this whole transaction. If it be necessary, however, the decision of the Supreme Court of Montana in the case of Coombs v. Barker, together with Jackson v. Ludeling, 88 U. S. 616, and Ervin v. Or. Ry. & Nav. Co., 27 Fed. 625, heretofore cited, ought to be sufficient. This redemption proceeding was clearly an "act performed with intent to delay and defraud the complainant of its demands," and therefore void under Section 4490 of the Civil Code of Montana.

IV.

The attachment lien, even though valid in the first instance, was lost by delay in issuing writ of execution for the sale of the property.

It is held that the abandonment of a levy may be presumed from delay in enforcing the same.

11 Am. & Eng. Enc., 692.

18 Am. & Eng. Enc., 100.

An attempt to use an execution for the purpose of security merely is a perversion of the writ, and postpones it and the lien thereof to other liens or executions subsequently issued or accruing.

17 Cyc. 1058.

Barnes v. Bellington, 2 Fed. Cas. 1015.

Berry v. Smith, 3 Fed. Cas. 1359.

"An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity towards the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce the collection of his judgment. He is likely, therefore, to take out execution with a view of binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law does not tolerate. Whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outranked by subsequent

executions. Rarely has this object been proclaimed by the plaintiff in execution. It is inferable from express direction to an officer not to proceed with a levy or a sale, or from any language or course of conduct from which the conclusion may fairly be drawn that the plaintiff did not intend to make his writ immediately productive, but rather to secure the advantage of a lien on the property of the defendant."

2 Freeman on Executions, 206.

Williams v. Mellor, 12 Col. 1; 19 Pac. 842.

Hall v. Hall (Tenn.), 24 Am. Dec. 590.

Owens v. Patterson (Ky.), 44 Am. Dec. 780.

In a well considered case, the Supreme Court of Illinois has held that fraud operates as a legal conclusion through the consent of the judgment creditor to the postponement of a sale under execution.

Sweetser v. Matson, 39 N. E. 1036; 27 L. R. A. 374 and notes.

It is contended by appellee McLure that, by virtue of Sec. 1210 of the Code of Civil Procedure of Montana, he was at liberty to have a writ of execution issued to enforce his judgment at any time within six years, and that the property held under attachment became liable to execution taken out during such period. It is true that this is the time fixed by the statute within which execution may issue, but we contend that this right must be exercised in harmony with the general principles applicable to executions, as we have given them from Freeman and other authorities. That this time has been fixed by statute does not mean that a plaintiff in an action may levy upon property and use the lien thereby acquired for the purpose of security merely, to the detriment and

injury of other creditors. Besides, so far as levy under writ of attachment is concerned, the Montana laws do not attempt to fix the period of time during which it may be kept alive. While an attachment lien is considered as merged in the judgment or execution lien (if there be such), yet in order to preserve the rights acquired as of the date of the attachment, as distinguished from the date of the judgment or execution lien, certainly the general principles above stated, in the absence of statutory provision, should govern, and the plaintiff should proceed to sell the property attached within a reasonable time. In this case McLure's judgment, rendered in Lewis and Clark County, did not become a lien on real estate in Cascade County, but, as the bank had a prior lien by attachment anyway, we need not discuss this. The levy under McLure's writ of attachment was made on the real estate on the 16th day of December, 1901, and the levy on the personal property on the 18th day of December, 1901. No attempt whatever was made to sell the property until the 10th day of January, 1907. This was unquestionably an unreasonable delay. Possibly circumstances might arise in some extreme cases to justify such delay, but none appears in this case. We recognize that the authorities make some distinction between levies upon personal property and levies upon real property. This is based upon the fact that personal property is levied upon by taking possession, while real property is levied upon simply by filing notice with the proper officer.

In the case at bar there ought to be no question as to the abandonment or loss of the levy made upon the personal property. In this connection, we call the Court's

attention to the fact, too, that in paragraph 5 of the bill of complaint (Tr. p. 8), it is alleged that under the complainant's writ of attachment the "sheriff made his levy upon all the personal property by taking possession thereof simultaneously with the said United States marshal, but said possession having been thereafter surrendered by reason of the interference and obstruction of the said marshal, and the said Tripp continued to hold possession of all said property." The levies in the first instance, therefore, upon the personal property were equal in point of time, and the sheriff only surrendered possession because of the necessities of the case. The marshal failed to sell the property for over five years, and clearly lost whatever rights he had previously acquired.

Again, it is alleged in the bill, paragraph 11 (Tr. p. 19), "that on the 12th day of January, 1907, complainant caused a writ of execution to be issued upon its said judgment; that in pursuance thereof the sheriff of Cascade County levied upon all the personal property of the defendant by delivering a copy of said writ of execution, together with a notice, to said John L. Tripp, who was then and there in possession and control of the same, stating that all personal property in his possession and under his control belonging to the defendant company was attached in pursuance of said writ, as provided by Section 895 of the Code of Civil Procedure of the State of Montana; that said sheriff is unable to proceed further with the service of said writ of execution on account of the pretended lien of the defendant, Charles D. McLure."

Section 895 referred to authorized a levy in the manner stated where the property was in the possession of a third

party. Appellant therefore clearly had, and still has, a prior lien upon all the personal property, both by reason of the abandonment of his levy by McLure and the later levy made by the appellant, but to prevent a conflict between the state and federal courts, under the authorities cited at the outset in our brief, it would be impossible for the appellant to proceed further, even as to the personal property, without permission of the Circuit Court, which it is now seeking.

While the situation with reference to the personalty would of itself make it incumbent upon the court to overrule the demurrer to the bill, it is, however, the real estate covering the mines and concentrator of the Diamond R Mining Company with which we are chiefly concerned. To determine whether a different rule should apply in this case to the real estate than to the personal property, it would be well to consider the principle involved. The principle governing in this matter is quite clearly set forth in a decision relied upon by counsel for appellees, to-wit, Lant v. Manly, 75 Fed. 627, wherein Judge Taft says: "It is true that the duty of the judgment creditor to use reasonable dispatch in levying the execution upon the personal property attached before judgment is imperative, and if the property here seized were personal, the contention of appellees might succeed, but it is real estate, and with respect to attachments on that kind of property we conceive that a somewhat less strict rule of diligence applies. Personal property can only be attached by actual seizure by the sheriff, marshal or other executive officer. The lien on it can only be maintained by its manual retention in official custody. A release of it by the attaching officer for any purpose destroys the

lien. The necessity for excluding the owner from beneficial enjoyment in the thing attached has justly given rise to the requirement that when his judgment is obtained the attaching creditor shall speedily satisfy it out of that which he has so long withheld from the defendant owner. If no execution is issued upon a judgment within a reasonable time, the lien is to be regarded as abandoned, because the defendant owner of the attached personalty may justly complain that if he is not to have the use of it, he ought, at least, to have it sold and the proceeds of it applied to the payment of his debts. We are not prepared to deny that a lien on real estate secured by attachment, might be abandoned by great delay in levying execution, especially where the rights of third parties may have intervened between attachment and execution, but there is nothing of the kind in the case at bar. * * Taking into consideration the real nature of the attachment, we think that, in a case where the rights of third parties do not intervene, no delay in the execution, after judgment, ought to destroy the lien, if it fall short of clearly indicating an intention to abandon the same. Does a delay for nine months in this case indicate such an intention on the part of the complainant? We are very clear that it does not. In Speelman v. Chaffee, 5 Col. 256, it was held that the delay of a year in issuing execution, after judgment, on an attachment on personal property, was not unreasonable or such as to indicate abandonment. If this be a sound view in the case of personality, then, for the reasons stated, a delay of nine months in case of real estate ought certainly not to work an abandonment."

This decision clearly recognizes that a lien on real

estate, as well as on personal property, may be lost by delay. In the case at bar, the bill contains averments which clearly bring it within the doctrine announced by Judge Taft, for in paragraph 10 thereof (Tr. pp. 17-18), complainant alleges "that since the said attachment said defendant, Charles D. McLure, by keeping said John L. Tripp in the possession and control of said property, both real and personal, under said attachment, has deprived the said Diamond R Mining Company and its stockholders of the possession, use and enjoyment of all said property, and its mines have suffered great and irreparable damage and injury by disuse and neglect during said period of time." There is, therefore, sound reason for holding that McLure has lost whatever rights he may have acquired by levy upon the real property as well as upon the personal property.

Furthermore, to hold, as the Circuit Court did, that McLure had the full period of six years under the statute to issue execution, and drawing the conclusion therefrom that a lien could not be lost during such period, is to ignore all the facts and circumstances set forth in the bill showing that this delay was for a fraudulent purpose. There are many rights conferred by statute that a party may be free to exercise so long as he does not do so for the purpose of defrauding others. The statutes, for instance, declare the manner in which a party may execute a deed, mortgage or other instrument, but, if it be shown that this right is exercised for a fraudulent purpose, then the act is illegal and invalid, no matter how strictly it may conform to the statutory requirements.

The only case that we have been able to find that seems

directly in point is by the Supreme Court of Michigan. A statute was passed in that state enacting that all levies upon real estate theretofore made should cease to be a lien at the expiration of five years from the time the act became a law, and that all levies thereafter made should become and be void after the expiration of five years from the making thereof. The court held that a lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to sale "where no fraudulent purpose is shown on the part of the execution creditor."

Ludeman v. Hirth, 96 Mich. 17; 35 A. S. R. 588.

The Court in the above case also cites the following Michigan case, wherein the Court said: "It is also urged on the part of the complainant that a levy thus made and allowed to stand may be used for the fraudulent purpose of assisting the debtor in hindering and delaying other creditors in the collection of their demands. This is possible perhaps under some circumstances, but there is nothing in this case to indicate any such purpose. The evidence tends to show that the officers of the bank delayed proceeding to a sale under some expectation of receiving their money without doing so, and no ground is furnished by the evidence for suggesting collusion with the judgment debtor. We know of no ground for holding a levy, duly made and notified, void from the mere lapse of less than half the life of a judgment. The good faith of the bank is not successfully assailed in this case, and we are therefore of the opinion that there was no ground for setting aside its levy."

Ward v. Citizens' Bank, 9 N. W. 437.

The cases cited clearly recognize that an attachment lien may be lost if the creditor delay the sale for a fraudulent

purpose, and even where the statute fixes the life of the attachment. That this principle is applicable to the case at bar is unquestioned in view of the averments in the bill (par. 9, Tr. p. 16) that "the McLures were acting in collusion and in fraud of the rights of the complainant when they delayed for five years to take any steps whatever to sell the property held under attachment," etc., (par. 8, Tr. pp. 14-15) that they kept the judgment alive until after March 23, 1905, when it was used as the basis of redeeming the portion of the concentrator costing $75,000.00 by paying $1,930.25, and (par. 10, Tr. p. 17) that while the whole plant was worth $500,000.00 at the time of the attachment yet owing to said redemption and damage by disuse, neglect, etc., all of said property is not now of sufficient value to more than satisfy McLure's judgment, and (par. 6, Tr. pp. 11-12), that "the attachment was made and the action prosecuted and judgment thereafter taken for the express purpose of hindering, delaying and defrauding this complainant out of its demands, and the said proceedings will have the effect so intended unless set aside by this Court." In fact, the purpose and effect of this delay must necessarily be considered in connection with all the allegations of the bill, from which it clearly appears that this delay was a part of the whole fraudulent scheme. It is a matter to be judicially recognized that this judgment has been bearing the legal rate of interest (8 per cent.), so that by the time of the sale as advertised, instead of being $86,180, it amounted to over $120,000; in other words, it was almost half again as large. McLure has by his delay thereby increased his claim almost one-half and has added that much to the obstruction in the way of the appellant. The

appellant is not in the mining business. It is a national bank. The inequity of allowing McLure to sit by for five years without proceeding to satisfy his judgment out of the property attached, in view of the palpable injustice to other creditors and the minority stockholders of the debtor company, and under the conditions and circumstances disclosed in appellant's bill, is too glaring to require extended comment. Any one living in a mining country can readily appreciate the disastrous effect upon all mining enterprises by such a course of conduct as is here complained of. If a creditor, and particularly a bank, to which mining companies must necessarily look for temporary assistance in an emergency, as appears in this case, are to be denied relief on such a state of facts as are here brought before the court, no credit can be safely given to any mining enterprise, no matter how deserving.

V.

This action is not barred by appellant's laches. The citation and discussion of a multitude of cases upon this question of laches becomes unnecessary, in view of the principle laid down so clearly and succinctly by this Court in the recent case of London & San Francisco Bank v. Dexter, Horton & Co., 126 Fed. 593. The principle to be applied is thus stated by this Court:

"No hard and fast rule has been laid down by the courts which can be said to cover all cases wherein the defense of laches is invoked. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases

involving the defense of laches, however, and that is that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties, occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced." Citing:

Galliher v. Cadwell, 145 U. S. 368; 36 L. Ed. 738.

Halstead v. Grinnan, 152 U. S. 412; 38 L. Ed. 495.

Wheeling Bridge & T. Co. v. Ryman Brg. Co., 90 Fed. 189; 32 C. C. A. 571.

This Court also quotes from DeMuth v. Bank, 85 Md. 326; 60 A. S. R. 322, as follows:

"Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. There must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine of laches can be successfully invoked."

We might also add the following to the citations supporting the proposition as above stated by this Court:

Bartlett v. Ambrose, 78 Fed. 841; 24 C. C. A. 397.

Hammond v. Hawkins, 143 U. S. 224; 36 L. Ed. 145.

Townsend v. Vanderwerker, 160 U. S. 171; 40 L. Ed. 387.

McIntyre v. Prior, 173 U. S. 59; 43 L. Ed. 606.

O'Brien v. Wheelock, 184 U. S. 450; 46 L. Ed. 656.

Cahill v. Superior Court (Cal.), 78 Pac. 467.

Turpin v. Dennis (Ill.), 28 N. E. 1066.

Tynan v. Warren (N. J. Chan.), 31 Atl. 600.

Parker v. Bethel Hotel Co. (Tenn.), 34 S. W. 209; 31 L. R. A. 713.

16 Cyc. 152-3.

Adopting the language of this Court in London & San Francisco Bank v. Dexter, Horton & Co., supra, we may ask: "Applying this definition and the principle above stated to the case at bar, what duty has the appellant failed to perform? Wherein has the delay caused any prejudice to the appellee? What change in the condition or relations of the parties to the suit has occurred during the period of alleged delay which would now make it inequitable to permit the maintenance of this action? Was there such a delay as, under the circumstances, could be deemed abandonment of the appellant's rights?"

Answering the first question, we say that there was no duty that the appellant failed to perform. After effecting its attachment and procuring judgment, it was not, under the circumstances, obliged to proceed to sale or do anything further, and, in fact, McLure had, by his own acts in attaching and taking judgment in the Federal Court, virtually tied appellant's hands so that it could do nothing. At the time of these attachments the property attached was worth a sum greatly exceeding the two judgments combined, so that if McLure had proceeded to sale with reasonable diligence both judgment creditors could probably have been satisfied out of the property without the necessity of asking the Circuit Court to determine the priority of the attachment liens. Appellant was clearly under no obligation to McLure in any way, shape or form, and, indeed, it would have had

no right to ask aid from the court until it could show that its rights were prejudiced or seriously threatened by McLure's acts.

Answering the second and third questions as above, we say most emphatically that appellant's delay has caused no prejudice to appellee and that there has been no change in the condition or relations of the property or parties to the suit during the period of alleged delay on appellant's part which would now make it inequitable to permit the maintenance of this action. Paragraph 13 of the bill of complaint (Tr. p. 30) expressly avers that no such change has taken place. Without this averment, however, the nature of the proceeding itself would almost necessarily preclude this. Charles D. McLure is alive and personally before this Court, and the contentions which we have urged on appellant's behalf are of such a nature that the facts and circumstances with reference to them are easily accessible to both sides. The very nature of this case is such that the delay, if it be deemed such, in bringing this action cannot possibly make it inequitable to grant appellant now the relief to which it might have been entitled if suit had been commenced at an earlier date. The appellant has done nothing to mislead McLure in any respect. It has not caused him to expend any money in improvements, or to do anything that he did not choose to do. It is true that, according to the bill of complaint, the property has depreciated in value, so that it is now worth no more than enough to satisfy McLure's judgment. This, however, is not any fault of the appellant, but is a condition that has been brought about by McLure himself. This is a change that is prejudicial to the complainant, for

which McLure, by his own negligence and laches, is alone responsible, and of which we are now complaining.

Answering the fourth question, we say again most positively that the delay in commencing this proceeding cannot be deemed an abandonment of appellants's rights. The appellee cannot urge that our delay is abandonment without confessing that his delay is also an abandonment, and which is one of the grounds of this action. McLure, however, was free to proceed to a sale of the property whenever he chose to do so, and abandonment can therefore be properly charged against him, but, under the decisions cited by us in the first subdivision of our brief, the appellant could do nothing further than to make the levies which it did. Appellant did nothing to indicate any intention to release or abandon its attachment, or to cause appellees to believe that such was its intention.

Even were the two actions in the same court, and even were there no question as to priority, there would be ample excuse for delay by the later attachment creditor, while the same delay on the part of the prior attaching creditor would be inexcusable and would amount to abandonment. There is clearly nothing in this case that puts the appellees in a position to successfully invoke the doctrine of laches upon any of the grounds mentioned by this Court and the other courts in the decisions above cited. There is certainly nothing that the appellant has done, or failed to do, that would amount to an equitable estoppel. There is nothing that the appellant has done or failed to do which would warrant a court in now saying that to grant the appellant the relief asked for at this time would be doing injustice to the appellees.

We submit that we are correct in this, even if the bill of complaint set forth no reasons whatsoever why appellant had not instituted this action at an earlier date, and the decision of this Court above cited would be sufficient authority for this statement.

Apellant has, however, in an abundance of caution, and so that the Court may fully understand appellant's position on this matter, set forth in paragraph 13 of its bill (Tr. p. 30) the following facts: That the defendant, McLure, beginning in March, 1902, and ending in April, 1906, was making payments to the State Bank of Neihart upon a loan made by said bank under the same circumstances and conditions, and for the same purpose, as the loan made by the complainant; that McLure also, in the year 1905, paid several claims against the Diamond R Mining Company; that complainant was informed of the facts with reference to the payment of the money to the Bank of Neihart, and of the other claims, and by reason thereof, when taken in connection with McLure's promise to pay complainant the money due it, complainant was led to believe that McLure would pay its debt and waited for him to do so; that in 1905 parties representing McLure came to complainant and stated that there would be an adjustment of the affairs of the company, including complainant's debt; that McLure was without the State of Montana all the times mentioned, and complainant therefore waited for him to come to Montana to pay its said debt as he had agreed, and also, as the controlling stockholder of the company, to call a meeting of the stockholders to see what could be done to protect their interests; that McLure did not come to Montana until the latter part of 1905, or come at all to

Great Falls, the office of the company, or undertake in any way to adjust the affairs of the company or complainant's debt; that complainant desired to give McLure, as well as said company, reasonable time and opportunity to adjust said indebtedness before instituting further proceedings, knowing at all times that complainant's delay was in no manner prejudicial to McLure or the company, and complainant alleges that no changes have taken place or circumstances arisen that would make it inequitable to recognize at this time the rights of complainant as herein set forth, or that would prevent said parties meeting the issues raised as fully as though said action had been commenced at an earlier date.

In addition to the foregoing, we again call the Court's attention to the redemption by McLure of a part of the concentrator from the Bartlett sale, such redemption being made on March 23rd, 1905, and sheriff's deed issued on January 2nd, 1906. This is important to consider in connection with McLure's promises to adjust the affairs of the company and to pay complainant. Until McLure took a deed to this part of the concentrator for himself, appellant was, under all the circumstances, justified in believing that the company's affairs would be straightened out, and that the appellant would get its money. Until McLure took this deed, the company's whole plant was kept intact, and it was this attempted segregation of the plant that operated so much to depreciate its value and to jeopardize appellant's claim. While courts of equity require diligence in the commencement and prosecution of actions, they certainly do not encourage needless litigation. A party seeking equitable relief

ought to be commended for waiting until such time has arrived as to show the necessity for it, instead of being turned out of court because he has not been hasty. The appellant certainly acted within a reasonable time after McLure had taken the sheriff's deed, and after giving McLure reasonable opportunity to keep the promise he had made.

In this connection, too, we take the position with all confidence that McLure is estopped from invoking the doctrine of laches, no matter how long appellant might have waited before commencing action. McLure had personally promised to pay the appellant. The appellant would not have advanced the money to the company without this assurance. It therefore does not lie in McLure's mouth to say that the appellant ought to have proceeded with more diligence in asserting a right to a first and prior lien upon the company's property. He is equitably estopped, in view of his promises, the first being made in 1900 and the last in 1905, from complaining of any delay on appellant's part, as well as equitably estopped from claiming to have a lien on the property in preference to appellant.

Our own view is that appellant could have waited until after the sale, or even after the execution of a deed, providing in the meantime no third party had purchased the property for value without notice and there had been no substantial expenditures made in the way of improvements or developments. Appellant has, however, commenced this proceeding before the marshal's sale, out of an abundance of caution, before the rights of third parties could possibly intervene or any material change could take place with reference to the property.

We confidently submit to the Court that there is absolutely no merit in the contention of appellees that this action is barred by laches on appellant's part.

The suggestion of counsel for appellees that this action does not lie, because of the allegation with reference to the promise on the part of McLure to pay the appellant, is also devoid of merit. Holding, as appellant does, an attachment and judgment against the Diamond R Mining Company, whose validity is unquestioned, the appellant clearly has a right to enforce satisfaction of its claim out of the property attached. Whether McLure was in any way liable also on this obligation could not operate to prevent appellant from enforcing its rights fully against the company.

We quote from Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312; 39 L. Ed. page 716: "Are creditors who are neither stockholders or directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the endorsement of one of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation because, forsooth, they have also the guaranty of some of the directors or stockholders, whose guaranty may or may not be worth anything?"

The foregoing decision is not only authority for the maintenance of this action, regardless of whether the appellee McLure may also be liable to appellant, but is also authority for allowing appellant a prior lien by virtue of its attachment.

CONCLUSION.

We respectfully submit to the Court that appellant has, in its bill of complaint, set forth facts showing that the prior lien claimed by the appellee McLure under his attachment proceedings in the Circuit Court should be set aside and held for naught; that the sheriff's deed to McLure of January 2nd, 1906, covering the portion of the concentrator redeemed by him from sheriff's sale, should likewise be declared void and of no effect; that the appellees should be enjoined from selling or disposing of the property mentioned or acquiring any rights thereto by virtue of any sale thereof under the judgment of said appellee McLure; that the appellant, by virtue of its attachment on all of said property at the time of the commencement of its suit in the state court, and by virtue of its renewed attachment upon the personal property on the 12th day of January, 1907, had and still has a first and prior lien upon all of said property, and that appellant should have the permission of the Circuit Court to proceed under writ of execution on its said judgment to sell all of said property, or so much thereof as may be necessary to satisfy its said judgment.

It is respectfully submitted that the order of the Circuit Court sustaining the demurrer of appellees to appellant's bill of complaint, and the decree of said Court finally dismissing said bill, should be reversed.

A. C. GORMLEY,

Solicitor and Counsel for Appellant.